STATE OF MICHIGAN

COURT OF APPEALS

JAMES DEPREE and LILLY DEPREE, Plaintiffs-Appellants,	UNPUBLISHED May 13, 2003
v	No. 234713 Allegan Circuit Court
KEITH ONKEN and VICKY ONKEN, Defendants-Appellees.	LC No. 00-027908-CH

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order granting defendants' motion for summary disposition. We affirm.

Plaintiffs and defendants each own a residential lot in the Recreation Development Subdivision, which is located in Allegan County. A restrictive covenant agreement ("RCA") contains various terms that are binding on all the residential lot owners in the subdivision. For example, the RCA contains provisions preventing lot owners from engaging in commercial business on their lots, constructing a building within five feet of any lot line, and erecting a second residential building on any lot. The RCA also grants the lot owners access to "Outlot B," a tract of land that runs between Hutchins Lake and two public streets. Thus, Outlot B provides lake and road access for several property owners.

The parties' respective lots are adjacent to Outlot B. Plaintiffs' complaint alleged that defendants engaged in several acts running afoul of RCA provisions: (i) removing a portion of the seawall on Outlot B; (ii) removing bushes and cutting down trees on Outlot B; (iii) building a "second garage" that is intended for commercial use; (iv) constructing the second garage within five feet of the lot line between defendants' lot and Outlot B; (v) expressing an interest in constructing a boat ramp on Outlot B; (vi) constructing a road on Outlot B; and (vii) changing the grade of Outlot B. Plaintiffs further alleged that the second garage was going to be "improperly used as a residence or living quarters." Plaintiffs' complaint sought injunctive relief and damages, alleging that the above actions constituted a breach of the RCA provisions and a

trespass. As noted above, the trial court granted defendants' motion for summary disposition on each of those claims.[1]

Although defendants' motion for summary disposition referenced MCR 2.116(C)(8), and (10), the trial court did not cite either court rule. Generally, we review de novo a trial court's ruling on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The *Beaudrie* Court added:

> A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Id.* at 129-130.]

In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* Summary disposition may be granted if, based on the evidence presented, reasonable minds could not differ in resolving the material factual questions. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Initially, we agree with plaintiffs' assertion that they had standing to attempt to enforce the RCA. Generally, we review de novo the question of whether a plaintiff has standing. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002). Here, ¶ 10 of the RCA plainly states that "the owner of any lot in said subdivision, may commence and maintain legal proceedings, either equitable or legal in nature, to enforce compliance with these covenants and restrictions, and to obtain appropriate money damages as may be caused by a breach of such covenants and restrictions." Accordingly, plaintiffs had standing to pursue equitable relief or monetary damages caused by a breach of the RCA.

However, we are not persuaded that reasonable minds could differ regarding plaintiffs' factual allegations. For example, reasonable minds could not differ in concluding that defendants' "second garage" was not within five feet of the lot line. Indeed, plaintiffs produced a survey establishing the distance as more than five feet. Although plaintiffs' assertion that the

---

[1] Plaintiffs' complaint also alleged a claim for removing timber from Outlot B. The trial court dismissed this claim without prejudice, ruling that any damages for removing the timber would be less than $25,000—below the circuit court's jurisdictional limit. Although defendants note that they would have preferred dismissal with prejudice, they acknowledge that they have not filed a cross-appeal and are merely requesting that we affirm the trial court's decision regarding the timber claim. Thus, we decline to address this issue, and our ruling does not preclude plaintiffs from pursuing this claim in district court.

concrete slab in the front of the "second garage" encroached the five-foot boundary, reasonable minds could not disagree in concluding that the concrete slab is not a "building."

Further, there is insufficient factual support for plaintiffs' assertions that the "second garage" was intended to be used as either a commercial building or living quarters. Defendants' use of their residence address in advertisements for their sole proprietorship business does not establish an intent to use the "second garage" as a building to store commercial vehicles. Moreover, defendants' unrebutted affidavit established that they *operated* their business at two locations outside the subdivision. Nor do pictures of defendants' construction vehicles on the property, while the second garage was being constructed, support plaintiffs' assertion that defendants were going to ultimately use the second garage in their business. The presence of a toilet in the second garage does not, standing alone, provided a sufficient factual basis for reasonable minds to disagree in rejecting plaintiffs' assertion that the second garage was anything other than an accessory building. Moreover, compliance with the local zoning ordinances is irrelevant.

We further note that Paragraph 11 of the RCA allows the lot owners to use and travel on Outlot B to access both Hutchins Lake and the public streets. There is absolutely no evidence suggesting that defendants' changes to Outlot B, assuming that they are true, interfered with plaintiffs' access to either Hutchins Lake or the public streets. Reasonable minds could not differ in finding that defendants did not engage in any acts that violated the RCA; if anything, defendants' purported acts facilitated the adjacent property owners' ability to use Outlot B as contemplated by the RCA. Thus, we conclude reasonable minds could not differ in finding that defendants have not engaged in any conduct running afoul of the RCA.[2] Therefore, the trial court did not err in granting defendants' motion for summary disposition on plaintiffs' claim that defendants violated the RCA.

For the same reasons, the trial court did not err in dismissing plaintiffs' claim that defendants' trespassed on Outlot B. In other words, reasonable minds could not differ in finding that plaintiffs have not exceeded the scope of their rights under the RCA. Consequently, the trial court did not err in dismissing plaintiffs' counts I and II.[3]

Finally, we note that plaintiffs, in responding to defendants' motion for summary disposition, failed to introduce any evidence or advance any argument indicating a "reasonable chance" that further discovery would result in additional factual support for their claims. *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000). As such, there is no basis for us to conclude that summary disposition was premature.

---

[2] Further, plaintiffs' allegation that defendants "expressed an interest" in constructing a boat ramp on Outlot B is plainly not actionable because there is no evidence that defendants have taken any steps in furtherance of that idea. Moreover, defendants' affidavit indicated that they had been interested in constructing a boat launch, but ultimately abandoned the idea. As such, reasonable minds could not differ in rejecting this particular allegation.

[3] As noted above, we decline to disturb the trial court's ruling with respect to count III. See *supra* n 1.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens